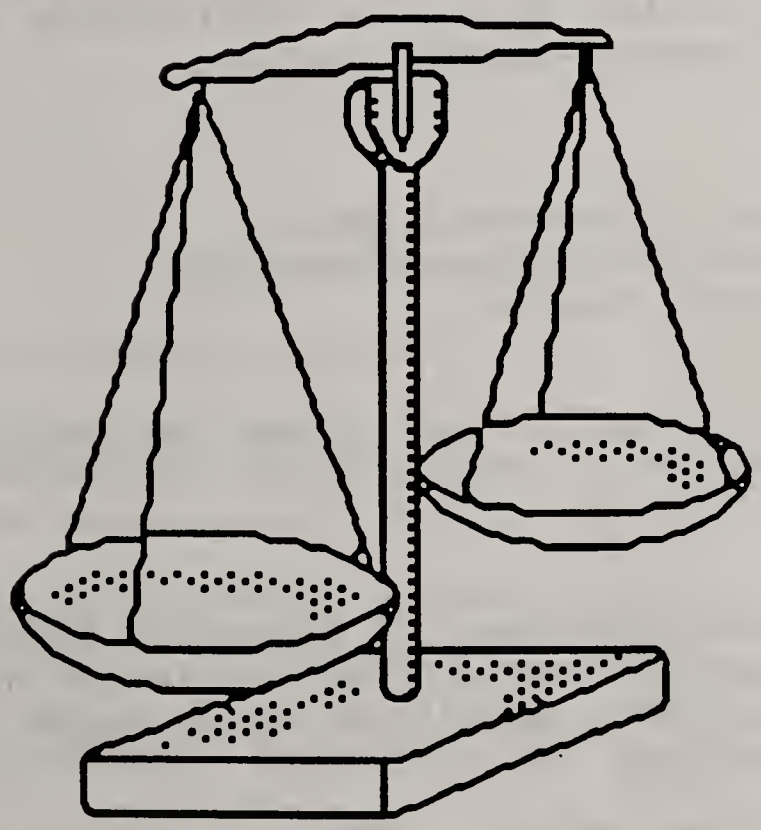
# Department of Education

# Bureau of Special Education Appeals

# Appeals News





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## EDITOR'S NOTE

Since the last issue of Appeals News, the Department of Education has found it necessary to close the remaining Regional Education Centers. Therefore, all mediators are now housed in the Central Office located in Quincy. The Bureau would like to say "welcome," and to wish them well in their new surroundings. I regret to inform you that Michael Feer has left the Bureau; we will all miss him. (Art Stewart will be doing mediations for Michael's former towns.)

Another bit of news is that Appeals has moved from the third to the fourth floor. This was due to reallocation of space to make room for the people who came from the Regional Offices.

If anyone wishes to share any information with others, please feel free to do so by sending it to:

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I wish you all a healthy, happy and prosperous holiday season.

Ruby B., Editor

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## A COMMENT FROM THE DIRECTOR

by Kristen Reasoner Apgar, Director
Bureau of Special Education Appeals

The 1991 Volume of Appeals News presents an overview of the emerging issues in special education being addressed by disabled students, their parents, and by public school districts.

The 1990-1991 school year brought an expanded volume of hearing requests to the Bureau of Special Education Appeals - 404 this year, as compared to 385 in the prior school year. Despite this, a higher percentage of special education cases were able to be resolved prior to issuance of a decision, either through successful mediation or in pre-hearing conferences conducted by Bureau hearing officers. Thus, the cases which actually resulted in formal decisions were likely to be those in which the issues were the most difficult for the parties to resolve, and correspondingly, the most difficult for the hearing officers to decide. Further, a significant number of the cases decided involved issues that tested the outside parameters of eligibility for services under Chapter 766 and the Individuals with Disabilities Education Act (IDEA).

Several decisions involved the eligibility of non-disabled students for special education services under Chapter 766, or the possible liability of a public school system for failure to identify or provide services to a student, who has since graduated from or transferred from the school system. Another significant issue, which was addressed in two Bureau decisions for the first time, is the scope of a school district's obligation to provide extensive nursing services to special needs students, who need such services in order to benefit from special education. Two other decisions addressed the appropriate standards to be applied in determining the proper placement for students, who are disruptive or who violate school discipline procedures, under Supreme Court in Honig v. Doe. Another significant trend has been the increasing degree to which public schools are offering special needs students educational programming in more integrated settings. Where such models were able appropriately to serve special needs students, hearing officers have ordered those less restrictive settings, as they are required to do under state and federal law.

In recent years, and particularly in 1989-1990, parents have prevailed in more cases decided by the Bureau than have public school districts. In 1990-1991 the reverse was true. Of the 44 decisions issued, 15 favored the position of the parents, 22 favored the position of the public school, and in 7 decisions the hearing officer ordered a significantly different program than that proposed by either the parent or the school district. (See attached BSEA Decisions History on p. 55).

There has not been a shift in the legal standards applied by the Bureau in deciding the cases before it. The standard for special education continues to be the provision of a free appropriate education which serves to maximize the educational potential of the special needs student in the least restrictive environment. The changing outcomes appear more reflective of changing service delivery models in public schools, increasing ability to resolve the substantial majority of disputes prior to decisions, and the complexity of emerging issues in special education.

# BETH'S CASE:
# A MEDIATED NEGOTATION

by: Art Stewart, Coordinator of Mediation

## The Mediation Scenario

A disagreement over the summer and school year placement of a three year old child, we will call Beth, occurs in late Spring. Beth's mother has two children with similar special needs. She feels that she has made some mistakes in educational planning for the first child and wants to avoid them for her second child. She comes to the mediation with three advocates, who have different levels of involvement with her family. One provides a direct service to her and her children. One has a child with similar needs (but talks at the mediation about her own child, not the child who is the subject of the meeting). The third advocate provides service to families based on category of need.

On the other side of the table, the school has brought two assistant superintendents, a summer program director, a TEAM leader, a teacher in the summer program, and the special education administrator.

At the mediation conference the task is to determine for a fragile three year old, what summer program and what school year program would do the least harm, given the rigor of transition from an early intervention program to a school-based program, and the most good through provision of structured delivery of service, and matching with peers, who would provide solid, but not overchallenging, language and cognitive models.

Beth's mother opens the negotiations by declaring that she wants no changes for Beth, who is fragile and who has problems with transitions. She has letters from Beth's doctors, which record their discussions with her about educational placements and support her desire to minimize the number of changes in Beth's program. Her advocates talk at some length about children like Beth and their difficulty in handling transitions, which gets expressed in aggressive behavior and cognitive confusion. Their approach is prepared and didactic. It is meant to support Beth attending the summer program at the early intervention center.

But what then?

Beth's mother rules out one program the school has offered, but has a number of specific questions about the second. Her most vocal advocate asks about the qualifications of the staff, asks for copies of their resumes, and asks for a written program description and a written description of the other students in the program. The mediator has some concern that the aggressive manner in which the questions are asked may engage the school's

defenses, rather than their collaborative problem solving.

The public school special education administrator is matter of fact in her responses and willing to provide the material requested.

The conference now moves to a series of separate caucuses between the mediator and the negotiators.

As the mediator reviews the school's proposed program with Beth's mother and her advocates, it becomes clear that the teacher, who will head the class in the fall, is known to and highly respected by Beth's mother. Her chief concerns revolve around the makeup of the class. She wants to know whether the other children will be too high or too low functioning in comparison to Beth, and whether they will have behavior problems that might constitute a risk to Beth.

The school provides the program documents requested and expresses some exasperation to the mediator, noting that the early intervention staff have recommended the proposed public pre-school program. The administrator describes the students who will be in the regular school year class in some detail, and mentions that they are the students who will be in the school's summer program, and that both programs are in the same classroom.

Beth's mother expresses doubts whether the program, staff or format will change substantially in September. In these times of continually eroding finances for public education, the question is not unfair.

The administrator is willing to stipulate in writing that these elements of the program will not substantially change.

This leaves us with what will be the transition point for Beth, at the beginning of the summer to the school summer program, or at the end of summer to the pre-school program?

Based on past experience with her older child, Beth's mother will not consider the school summer program. She is unwilling to consider how the circumstances might have changed in order to distinguish her experience of several years ago from the probable experience of her daughter in the current program. Also, to her mind, an important element is that the summer teacher is not the preferred fall teacher.

<u>An apparent deadlock.</u>

After hearing the assurances that the administrator was willing to make for the pre-school program, Beth's mother indicated a willingness to enroll her.

Hearing that the pre-school program was settled, the administrator was willing to make arrangements for the early intervention summer program with the stipulations that it is not

the last agreed upon placement (pending appeal in subsequent years) and it is offered at the public school's discretion, in no way reflecting on the merit of their own summer program.

Reviewing the Mediation

A consequence of the dispute on the participants was that each side had come to doubt the other's very motive. Moreover, the focus on the issues in question threw into eclipse the common interests, which each held, and the points on which they truly agreed.

A lot of what mediators do, in situations of highly defined conflict, is to help people hurt by the skirmishes, wounds and emblems of the conflict to deconstruct their defensive barriers briefly in caucus, in order to glimpse the legitimate interests and motives which might be sincerely held on the other side. Mediators further aim to help people on each side to bring to light their true concerns, unweighted by strategy or tactics, to be considered by fresh eyes.

Here the substantive questions have to do with the timing, benefits, costs and the readiness of Beth to experience a transition in her program.

As the mediator talks separately with the parent and school staff about their choices and options, they prefer to speculate about each other's motives. The mediator defers the theorizing about motives in order to focus on what the impact of each choice might be on Beth.

Let's look at this from the parent's point of view. Advised by many evaluators and advocates, at the table and away from it, trying to integrate the advice she has heard, she feels that she needs to minimize the number of changes her daughter would experience in terms of staff, fellow students, program and location. She likes the school's fulltime teacher, absent in the summer program.

From the school's point of view, they have a worthwhile summer program, a school year program, which would meet any comparability test, and an interest in working with this parent, personally and by requirement.

By the late stages of the negotiation, the mediator can revisit the issue of motives, having heard enough of the unvarnished wishes from each side to transmit some reassurance.

Both sides move from their initial positions in order to reach an agreement that calls for a continuation of the out-of-district summer program with enrollment in the school program in September. This reduced the number of transitions for Beth and provided a clear foundation for the school and parent to begin to work together.

What happened during the course of critically evaluating the provisions of the draft agreement is interesting. A school staff member said, "She got what she wanted. She told me beforehand that this is what she wanted."

In a separate conversation, one school administrator reviewed with another "Let's make sure we have this right. Didn't the lawyer say that we needed....?"

In short, they reached agreement because their advisors and ratifiers had prepared them on convergent rather than divergent paths, a fact which became clear on review of the mediated negotiation.

After a problem is solved, its outcome appears obvious and simply reached. The parent said to the mediator at the signing of the agreement, "This all could have been handled in a phone call."

On reflection, I am led to two observations. The first is that negotiation (and mediated negotiation) may lead to the "tolerable accommodation of the conflicting interests of society."

The second is, can we improve our management of conflict to prevent its leading people so far astray that their suspicions of each other's motives masks their own ability to envision changed circumstances and to weigh potential improvements?

## MOST RECENT HEADNOTES

### BSEA # 89-0200

Issues:
1. Whether LEA's proposed 502.4 IEP maximized student's potential?
2. Whether parents should be reimbursed for private residential school expenses which is not Ch. 766 approved?
3. Whether LEA should reimburse for private school placement during the year that no IEP was developed?
4. Whether a newly proposed 502.5 prototype placement is appropriate?

Profile: Student is an 18 year old young man with borderline cognitive skills and has language disabilities. He has a history of social/emotional difficulties. He functions at the second-seventh grade level academically.

Parents' Position:
Student requires a residential program in order to address his language and social/emotional needs.

School's Position:
Student requires a language-based program and social skill intervention, but does not require a residential program. He also requires vocational training.

Findings: The 502.4 prototype program failed to address student's need for a language-based program.

The LEA failed to promulgate a 1989-1990 IEP.

The day portion of the private school was appropriate. Thus the parents should be reimbursed for the 1988-1990 school years.

The 502.5 prototype placement offered by the public school is appropriate for 1990-1991. Thus, the parents should be denied reimbursement for the 1990-1991 school year.

### BSEA # 89-1038B

Issues:
1. Reconsideration, Decision on Remand.
2. Rulings on evidence in hearing.
3. Availability of reimbursement.

Profile: Student, at time of hearing, was nineteen with low average to borderline cognitive potential, described by the parties as a learning/language disability or as an attention deficit disorder and performing at a mid-second grade level in academic subjects.

Parents' Position:
The first decision in this case was legally incorrect in that it failed to order full reimbursement for student's placement at Learning Prep School by his parents, despite clear evidence that the public school had consistently failed to provide an appropriate educational program. Student was performing well below expected levels, and was benefitting from private program.

School's Position:
There was insufficient evidence on the record to support an order by the hearing officer placing student in the private school. Any inadequacies in the student's program could be remedied by ordering the IEP rewritten. The School District was prejudiced by refusal of private school to allow any staff other than Director of Special Education to visit program, and by admission of evidence from school years prior to those covered by IEP.

Findings:
1. Parents were entitled to full reimbursement for unilateral placement at Learning Prep School, where there was substantial evidence to support finding that public school program was inappropriate, and student received educational benefit from parents selected program.
2. Public School was not prejudiced by having only one representative observe private school programs.
3. Evidentiary rulings were legally correct, and did not prejudice outcome.

BSEA # 89-1682

Issues: (Decision on Remand from Supreme Judicial Court). Availability of reimbursement for unapproved special education program.

Background:
At time of initial hearing (1982) student was a severely-developmentally disabled, 10 year old child, exhibiting autistic-like features. Between January 1982 and May 1983, student attended a residential special education school in Arizona, which was not approved in Massachusetts (although it was approved by Arizona) pursuant to parents' placement. In December

1989 the Supreme Judicial Court remanded to the BSEA to determine if parents were entitled to reimbursement.

Parents' Position:
Parents were entitled to receive reimbursement because ultimately it was determined that student required a residential program, and the program selected was the only one available at that time, which would accept their son.

School's Position:
Parents did not act in good faith in making unilateral placement. School District should not be penalized by being required to pay for unapproved program many years later.

Findings: Parents were entitled to reimbursement under the standards set out by Supreme Judicial Court decision (Carrington v. Commissioner of Education, 404 Mass. 290 (1989)), because the program in Arizona provided appropriate special education services for student and met the approval standards of Arizona, even though it was not approved in Massachusetts. Parents cooperated with the local school district and even involved the district's special education director in search for appropriate program. At no time did school district offer a residential special education program to the student. Parents sought transfer of student to approved Massachusetts residential school at earliest opportunity. Therefore, parents acted reasonably under the circumstances.

BSEA # 89-1693

Facts: Fourteen year old student of average cognitive ability presenting with ADD (with hyperactivity), significant learning disabilities, and exhibiting generalized anxiety, anger, low self-esteem, aggressive and limit testing behaviors.

Educational history includes placement from 1984 to date, in 502.4 prototype substantially separate classes for learning disabled students, with counselling and speech and language therapies also provided.

The record indicates academic progress has been slow and behaviors have worsened.

The LEA proposes placement in a 502.4(i) alternative junior high school program, whereas parent asserts such program would not be appropriate and seeks an order from the BSEA that the LEA locate or create an appropriate program for student.

Issue: Will proposed IEP serve to assure student's maximum feasible educational development in the least restrictive environment consistent with that goal?

Determination:
The program proposed by the LEA, as modified by the terms of the decision (i.e., addition of 1:1 reading services, as needed, to reinforce skills taught in group situation) is upheld. The program is found to comport with the weight of expert recommendations as to requisite special education programming for this student: that is a highly structured, supportive program, with a behavior management system in place, offering a therapeutic milieu, on-site counselling, speech/language therapy, and small group individualized academics taught by special education certified staff.

BSEA # 89-1827A

Issue: Did school district comply with order of hearing officer to substantially modify the program it initially offered to the student, including among other things, provision of an extended year and extended day program, a behavior modification component for all aspects of the student's program and provide evidence that the proposed public school substantially separate class could provide a compatible peer group for the student.

Parents' Position:
The public school made only cursory modifications to the IEP, which the hearing officer had already found to be inappropriate. Extended day/extended year components were not spelled out. No service provider was identified, no hours for extended day or days for extended year program were identified. IEP did not address student's need for education addressing ADL skills or interaction of student in mainstream settings, such as lunch. The peer group in the substantially separate class was not appropriate.

School's Position:
School planned to develop recreational program or a special education "peer" program for student. It would have collaborative staff member coordinate behavior modification program between public school staff and home. Public School staff could coordinate student's program in keeping with modifications ordered by hearing officer.

Findings: 1. Public school did not comply with decision in that it had failed to develop and set forth in the IEP the extended day and extended year components

required to provide an appropriate program for the student.

2. Evidence at the compliance hearing indicated that the substantially separate classroom teacher whom the school had designated as the coordinator for the student's program had not been well-informed or sufficiently involved in the planning of the proposed program to be able to implement public school's proposed program.
3. Further evidence at compliance hearing demonstrated that the other students placed in substantially separate class proposed by the public school were working at significantly higher academic levels than the student in question and that the class would not provide an appropriate peer setting in which to address student's learning and socialization needs.

Therefore, the school system was found not to have complied with Bureau decision and ordered to identify an appropriate out-of-district, collaborative or day school, or if necessary, residential special education program.



Issues:
1. Did the BSEA have jurisdiction to join the Mass. Department of Education and the Department of Public Health as parties to the hearing?
2. Was the IEP calling for the student's placement at the Mass. Hospital School as a residential student appropriate?
3. Are one-to-one services of a "licensed health care professional," "related services," as the term is used in 20 U.S.C. s.1401 et seq?
4. Does Section 504 of the Rehabilitation Act require Mass. Hospital School to modify its staffing and structure, so as to permit the student to participate in its program?

Profile: The student has multiple physical handicaps, as a result of an automobile accident, which have caused him to be paralyzed from the chin down. He is unable to breathe independently and requires a positive pressure ventilator and diaphragmatic pacers in order to breathe. He needs frequent tracheal suctioning and constant monitoring in order to maintain a patent airway. He must be attended at all times by registered nurse or respiratory therapist. In addition, he requires substantial medical back-up, including a physician on-call in the event of a medical emergency.

Student's Position:
The Mass. Hospital School is the only appropriate residential special education program able to meet his needs. If he is not able to gain admission as a residential student, then he will be denied a free appropriate public education, in particular he will be denied the opportunity to be educated with peers, if he must remain in a hospital setting.

Schools' Position:
The Mass. Hospital School can provide an appropriate residential special education program, and is the only appropriate program known to them. It is the responsibility of Mass. DOE and DPH to pay for and provide the necessary services in order to enable the student to attend.

DOE's Position:
Although DOE did not dispute the appropriateness of the Mass. Hospital School as a placement, the cost of providing a licensed health care professional is not a related service, which the Hospital School is required to provide.

DPH's Position:
The Department of Public Health does not provide educational services at the Hospital School. All the eduoational services are provided by DOE in the day program at the school. Therefore, DPH is not subject to BSEA jurisdiction. There is also no remedy against DPH under Section 504, since the modifications to the Hospital Program which would be required in order to permit the student to attend would be unduly burdensome and costly.

Findings:
1. The BSEA has jurisdiction to join DOE and DPH as parties to a due process hearing under the Individuals with Disabilities Education Act (formerly the Education for Handicapped Act).
2. The student is entitled to be admitted as a residential student at the Mass. Hospital School, because it can provide an appropriate program for him, and no other appropriate program has been identified by the parties.
3. The student is entitled to receive nursing services, because they are required in order to benefit from his special education program and they are related services under the federal act.
4. Because DOE and DPH jointly fund the placement of residential students at the Mass. Hospital School, they are required to fund the student's program. DOE is responsible for paying for the related nursing services, as it is required to pay for educational services under the inter-agency agreement between it and DPH.

5. Under Section 504 of the Rehabilitation Act DPH as the agency which operates the Hospital School, is required to make reasonable accommodations for handicapped students. In this case, where no other program is available to provide appropriate education to the student, DPH must take those steps necessary to make its program accessible, including the hiring of medical staff needed to assure that he can safely attend the program as a residential student.

BSEA # 89-1855

Issues: What program will provide maximum feasible benefit in least restrictive setting?
Does child need residential placement for educational reasons?

Profile: Student is a 13 year old boy who first entered the foster care system at the age of two. He has a history of severe behavioral and emotional difficulties. He tests as having average to above average intellectual ability. While he is able to perform at grade level in most academic subjects, he has difficulty with attention and impulse control in the classroom. Student has exhibited verbal and physical agression, poor impulse control, distractability, hyperactivity, lying, stealing and firesetting. In March 1989, DSS removed him from foster care and placed him in a residential facility.

Parent (DSS) Position:
Student needs a 502.6 residential placement. He is unable to function successfully in a family living arrangement or a public school setting, because neither setting is sufficiently structured to deal with the magnitude of his acting-out behavior. Pittsfield has failed to provide him with an appropriate IEP. Student was not functioning to his potential in the substantially separate classroom offered by Pittsfield, and Pittsfield had trouble controlling him. Student needs a 24 hour behavior management program. The Children's Study Home, a residential facility located in Springfield, is the appropriate place for him.

School's Position:
Student needs a substantially separate community-based education program with therapeutic components and mainstreaming available, coupled with a small structured foster placement. Student was academically successful in a 502.4 classroom in Pittsfield, although his work habits and behavior need improvement and he

would benefit from behavior modification counseling. Student's acting-out behavior in Pittsfield was not as frequent or as severe as it was in his foster home, or as it is at Children's Study Home. Student was placed in residential care, not for educational reasons, but because of his behavioral difficulties and inability to function in a foster placement. Pittsfield did not conduct a TEAM meeting or propose an IEP for the 1989-1990 school year.

Findings: Pittsfield has not proposed a program that is reasonably calculated to provide student with the maximum feasible educational benefit, and the Children's Study Home is not the least restrictive setting appropriate for him. Pittsfield committed several significant procedural violations. In addition, classroom adjustments and techniques recommended by evaluators were not incorporated into any plan for him and no effort was made to implement a comprehensive behavioral management system in implementing a comprehensive behavioral management system in both home/school despite his critical need for this. The record indicates that Pittsfield is not able to adequately serve this child. Still, student was not removed from foster care for educational reasons and in choosing a placement, DSS did not look first to his educational needs. While DSS continues to be responsible for locating and funding an appropriate, safe living environment for him, Pittsfield is required to provide an educational program suited to his needs. Therefore Pittsfield shall bear responsibility for a program prototype 502.5 integrated day program with specific components recommended by Bay State evaluators and Pittsfield's psychologist. Also student should be referred for the appointment of an educational advocate by the Department of Education.

BSEA # 89-1983

Issues:
1. Did school provide an appropriate educational program for student during the 1988-1989 academic year?
2. Is the IEP drafted on February 8, 1990, reasonably calculated to provide the maximum feasible educational benefit in the least restrictive setting?
3. How should the student's profile be worded?

Profile: Student is a 17 year old, learning disabled student who has exhibited behavioral problems in school. The findings of a recent neurological evaluation suggest that student has an underlying seizure disorder. Throughout the course of the hearing, student received

home tutoring provided by LEA.

At the conclusion of the fourth day of testimony, the parties agreed that they would pursue a placement for student at the Lovering School, a Department of Education approved private special education school and that student would attend a graphic arts program at local high school. An IEP drafted on February 8, 1990, reflects this placement.

Parents' Position:

At a final status conference parent identified her position on the remaining disputed issues as follows:

1. Student's attendance record from LEA should be corrected.
2. The student profile on the February 8, 1990, IEP should be reworded to reflect the findings of a recent neurological evaluation of student.
3. The name of the counselors listed on the February 8, 1990, IEP should be corrected.
4. School should pay for costs for student's counseling that are not covered by insurance.
5. School should provide transportation that delivers student to school by 8:15 A.M. Parent also alleged that school had caused student harm by failing to provide him with an appropriate educational placement.

School's Position:

School agreed to correct student's attendance records, pay the costs for his counseling which are not covered by insurance, correct the name of the counselor listed on the February 8, 1990, IEP and provide transportation that delivers student to school by 8:15 A.M. School agreed that the student profile should be worded so as to reflect the findings of a recent neurological evaluation of student, but felt that the profile should not include highly technical language.

Findings:

1. The IEP drafted on February 8, 1990, is reasonably calculated to provide student with the maximum feasible educational benefit in the least restrictive setting and should be implemented immediately.
2. The student profile should be reworded to reflect the findings of the recent neurological evaluation of student, but should not include highly technical language.

BSEA # 89-2124

Facts: Developmentally delayed 14 year old girl, cognitively functioning in the moderate range of mental retardation and evidencing visual, motoric, attentional and behavioral needs. Student had been educated for the majority of her academic career within the SEEM Collaborative Educational Continuum. Parents sought a private day placement, asserting that the SEEM program placed too much emphasis on academics (which despite years of service delivery, student was unable to master) to the detriment of functional and pre-vocational services. The school system argued that the program proposed is functional in nature and offered the student the appropriate mix of functional, academic, and pre-vocational services, in addition to the broad range of therapeutic services she requires.

Issue: Does the IEP proposed for the student assure her maximum feasible educational development within the least restrictive environment consistent with that goal? If it does not, does the program available at St. Colletta's Day School meet said standard?

Conclusion:

Based upon the preponderance of the evidence presented, the SEEM Collaborative program (as modified by increased home economics services and greater focus on functional vs. traditional academic skills) would assure student's maximum feasible development in the least restrictive environment consistent with that goal. The program at St. Colletta's would be a more restrictive program for the student and in terms of substantive components and class composition is strikingly similar to the SEEM program.

BSEA # 90-0001

Facts: Fifteen year old learning disabled student of low average to average intellectual ability, who is self-confident, socially well-adjusted, conscientious and motivated. Significant grade level deficits, secondary to her disabilities, exist in academic skill areas.

Recent educational history includes participation in special education programs of the 502.3 prototype, entailing receipt of resource room services. The IEP under appeal would continue similar programming at the high school level (i.e., three periods daily in the resource room) as well as remedial reading, and bi-monthly language consult.

It is parents' position that (a) student has made very little progress over the last few years pursuant to public school programming, (b) current IEP represents more of the same, and (c) an alternative placement, to wit: the Landmark School placement would be too restrictive for this student.

Issue: Does the IEP proposed for student serve to assure her maximum feasible educational development in the least restrictive environment consistent with that goal? If not, would placement at the Landmark School meet said standard?

Determination:

The proposed IEP represents the least restrictive special education program in which this student's educational development can be maximized. Measurable academic gains have in fact been achieved by the student's tenure in the public school special education system. Furthermore, socially and emotionally participation in the public school special education program, as well as mainstream classes, has been a positive experience possibly. The current IEP is responsive to student's needs in that it offers her the intensive, small-group individualized services she required (via the resource room), a language-based approach to teaching in both English and remedial reading courses and coordination among service providers. Such program is superior to that available to this student at Landmark both in terms of staff credentials and its less restrictive nature.

BSEA # 90-0050

Issues: Should case be dismissed, because child is not living in Belmont and, therefore, Belmont has no legal obligation to provide special education to the student?

Profile: Parties stipulated that student lived with parents in Cambridge during the 1989-1990 school year.

Parents' Position:

Belmont's motion to dismiss should be denied, because Belmont is responsible for student's education during the 1989-1990 school year.

School's Position:

Motion to dismiss should be allowed. The parties stipulation that student and parents resided in Cambridge during the 1989-1990 school year settles the only essential fact in this case and absolves Belmont of responsibility for student's education.

Findings: Belmont's motion to dismiss is granted with respect to claims for reimbursement under the Education of the Handicapped Act, G.L. c. 71B and attendant regulations. Parties stipulation is dispositive with respect to those claims, as residency is the criterion for determining the responsibility of cities and towns for educating children. Residence simply requires physical presence as an inhabitant. Cambridge is where child resided for the 1989-1990 school year.

With respect to parents' claims under section 504 of the Rehabilitation Act of 1973, the parties are in dispute over facts material to a potential 504 claim. Without a hearing on those facts, there can be no determination as to whether or not there is a valid Section 504 claim, and such a claim cannot be dismissed as a matter of law.

BSEA # 90-0297

Issues:
1. Should the decision of the original hearing officer be reconsidered?
2. Could the parents/student seek reimbursement for a special education placement made by the parents after the student had "graduated" from the school district, when another school district currently had responsibility for provision of appropriate special education to that student?

Background:
Student attended a K through 8 school district. Several years prior to completing the 8th grade, the parents sought and received a special education evaluation for their child. At that time he was found to have no special needs. The parents did not challenge this finding. He completed his education in the district and passed all his subjects. Prior to entry into 9th grade in the regional high school district, parents placed the student in a private special education school. Approximately two years later, parents filed a hearing request, seeking reimbursement from the K to 8 school district. This matter was dismissed by the hearing officer, who found that there was no procedural violations committed by the K to 8 school district, and that the parents' claim was barred by laches. Parents filed for reconsideration of this decision.

Findings: The reconsideration decision upheld the original hearing officer's decision, holding that the parents had waived any claim they may have had against the K to 8 school district by failing to challenge the finding of no special needs in a timely manner, and that a

later finding that the student had special needs did not demonstrate that the earlier school district had violated the student's educational rights

BSEA # 90-0316

Issue: What proposed placement for 1989-1990 school year appropriately addressed student's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment.

Parents' Position:
School's 502.2 IEP, as well as alternative 502.3 IEP, were inappropriate to address student's special education needs; and that student required 502.5 private day school placement in order to appropriately address his special education needs so as to assure his maximum possible educational development in the least restrictive educational environment.

School's Position:
Proposed 502.2 IEP at public high school or, in the alternative, its 502.3 placement at the high school was appropriate to address student's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment; and that student did not require the restrictiveness of a 502.5 private day school setting.

Ruling: School's proposed 502.2 IEP at public high school was appropriate to address student's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment. Student, a 9th grader, had average intelligence with learning disabilities which caused him to function 2 - 3 years below grade level, based upon standardized testing. However, student had made steady, albeit slow, progress over the years under IEP's which provided him only one period per day of special education services; student was able to achieve and succeed in basic level regular education classes, attaining primarily B and C grades in his academic subjects; he had numerous strengths, benefitted from being mainstreamed, liked school, was liked by peers and teachers, and he had no emotional/behavioral problems. Further, the IEP in dispute doubled his special education services to two periods per day - one period specifically focused upon remediation of student's learning disabilities and provided one period for academic support in student's mainstreamed subjects.

Facts: Upon receipt of son's IEP, parents opted to postpone their decision on same until an independent evaluation was completed, and so indicated by signing the IEP in the space designating such option.

Parent's testimony indicates that thereafter, in a conversation with the public schools evaluation TEAM leader, parent was asked what facility she had selected, responded to the question, and was given no further information regarding procedures, forms, etc., required by LEA in order to process requests for independent evaluations. Parent then secured the evaluation for her son at the approved facility of which the LEA had been notified during the telephone conversation described above.

The evaluation TEAM leader testified that, as per her recollection of this telephone conversation, parent was asked if she was going to access her insurance, to which she responded in the affirmative. The ETL therefore did not furnish parent additional information regarding the procedure required by the LEA in order to process a request for an independent evaluation at school committee expense.

To date, the LEA has refused to pay the bill for evaluative services performed by the independent evaluation facility.

Issue: Is the LEA reponsible for costs incurred by parents as the result of the independent evaluation which they secured for their son?

Determination:

Parents informed the LEA, in writing, of their intention to obtain an independent evaluation and did so within 30 days. As such, they complied with those directives articulated in the written materials furnished them by the LEA. Parent, moreover, orally informed the LEA of the approved facility selected. Once informed of parental intention to pursue an independent evaluation, a school committee has the affirmative obligation to inform such parents of school policy and procedures with regard to same. In the instant case, the LEA failed to fulfill that obligation.

ORDER: The LEA is financially responsible for costs incurred by parents in securing the independent evaluation for their son, and shall forthwith tender payment for same.

BSEA # 90-0825

Issues: Whether the 502.3 prototype program offered by the public school or the residential program offered by the private residential school was the appropriate interim special education program for the student, pending completion of the hearing.

Profile: Student is a learning-disabled, high-school age student, who completed a program combining regular and special education classes with passing grades in the prior school year. Testing conducted by the private special education school, where he attended as a summer student, showed him performing near or above grade level in all areas.

Parents' Position:
Student requires a residential special education program at a private special education school for learning disabilities. Student requires the type of special education curriculum provided at the private school, rather than that of the public school program.

School's Position:
Proposed program for the 1990-1991 school year provides for a daily individual tutorial and assigns one teacher to supervise all of the student's program, thereby minimizing miscommunication and fragmentation.

Findings: There was insufficient evidence to conclude that a particular type of learning disabilities curriculum was required in order for the student to progress to the maximum extent. The prototype 502.3 program offered by the public school was able to provide appropriate special education in the least restrictive environment pending the completion of the hearing on the merits.

BSEA # 90-0950

Issues: Whether student who has a severe expressive language, communication disorder, requiring the use of an augmentative communication system could be appropriately served in an integrated pre-school program at the local school district or did he require the program offered by the Anne Sullivan Center?

Profile: The student is a three year old child with a diagnosis of cerebral palsy, resulting in significant delays in the area of expressive language, and moderate delays in fine and gross motor skills. He is of average to above average cognitive level, but currently communicates primarily through the use of an augmentative communication system (picture board).

Parents' Position:
The child is at a crucial stage where it is essential to address appropriately his expressive language deficits, thereby enabling him to be integrated as much as possible with non-disabled peers. The public school staff are not able to provide the highly-structured communication system the child requires, while the Anne Sullivan Center has experience with similar children. The Anne Sullivan Program is less restrictive and is more physically accessible.

School's Position:
The staff in the public school program are better qualified than those at the private school. The public school program is in all respects equal to or superior to the Anne Sullivan Program, and it is located much closer to the student's home. Both programs are prototype 502.8(b) integrated pre-school programs.

Findings: The integrated pre-school program offered by the Anne Sullivan Center offered more time in an integrated setting with typical and disabled students. Its setting was better suited to the student's needs, as it was a fully accessible building and comprised of 36 students, aged 3 to 7, as compared to the public school's program, which was located in a high school and which required the student to climb stairs and walk considerable distances. Finally, although the public school personnel were more experienced, the Anne Sullivan's staff possessed the legally-required certificates or licenses and the program was more geared to the needs of students with communication disorders, such as the student's. Therefore, the Anne Sullivan Program was able to provide for the maximum feasible development in the least restrictive environment.

BSEA # 90-0985

Issues: Whether student can be appropriately served in a substantially separate public school program, or whether she should be placed in the Learning Preparatory School, a prototype 502.5 placement?

Profile: A 14 year old student with cognitive deficits functions at the 3 - 5 grade level. She is shy and has difficulty with social skills.

Parents' Position:
Student requires a setting with all special needs students for socialization and self esteem issues. She also requires it in order to receive an integrated language-based program. Finally, the public school

program is taught in part by aides, in violation of state regulations.

School's Position:
Student would be provided a nurturing, self-contained setting, and a language-based program. The aides are assisting a certified teacher, not teaching the class.

Findings: The 502.4 prototype IEP is appropriate. It is a nurturing class, significantly more so than the previous year's program, which the public school has offered. It is language-based and sufficiently individualized to meet student's needs. The aides are, with some exceptions, assisting and not teaching. The exceptions can be remedied and are not of sufficient magnitude as to warrant reimbursement.

BSEA # 90-1018

Issues: Whether the 502.5 plan offered by the school, or the 502.5 placement chosen by the parents, is the least restrictive, appropriate, available, educational placement for student?

Profile: Fourteen year old hospitalized at McLean for dangerous, acting-out behavior. She had received no prior special education services or contact with the public schools. TEAM agreed student needs safe, supportive, therapeutic day school with extensive clinical supports and challenging academics.

Parents' Position:
The Arlington School at McLean offers a safe, familiar atmosphere where student can pay attention to school and appropriately use the clinical resources. It is the most logical school placement for a student, who is continuing to receive support and services from the Hospital. The New Perspectives School, offered by Wellesley, was never actually available to student, because she was never accepted in the program.

School's Position:
The Arlington School student population is too severely ill to serve as appropriate role models. The New Perspectives School is less restrictive and more academically appropriate for student. Student is attending Arlington School, only because all teens hospitalized at McLean are funneled into it.

Findings:
1. The New Perspectives School was never actually available to student.
2. The Arlington School offered student an appropriate educational program, while she was at

home, and after her re-hospitalization.
3. Tutoring, offered as an alternative by the school, was not recommended by any educational or medical expert on student's educational planning TEAM.

BSEA # 90-1019

Issues:
1. Is IEP proposed by LEA reasonably calculated to provide the maximum feasible benefit in the least restrictive setting?
2. If not, is the weekday residential program located at Perkins School for the Blind the least restrictive placement appropriate for student?
3. Is residential placement needed for educational reasons?

Profile: Student is a 19 year old child, who has been legally blind since birth, as a result of bilateral aniridia and congential nystagmus. He has been diagnosed as moderately mentally retarded, with significant deficits in the areas of speech, vision, language and cognition, and needs to improve daily living skills, as well as fine and gross motor skills. Student has been a special needs student in the public school since age 3. He has exhibited behavioral difficulties at home that have not surfaced at school, and he currently takes 50 mg. per day of mellaril.

Parents' Position:
Student needs a 24 hour residential program, such as that at Perkins. Over the last 2 years he has shown little progress in daily living and survival skills, and his behavioral problems have increased. Parents have met with psychologists and tried behavior management techniques, but their success with student has been limited. He has made no progress in his current setting and has been unable to generalize learning. He needs an integrated behavioral approach to learning focused on functional academic, self care and survival skills. It will be more difficult to reshape his behavior as he gets older. A highly-structural, twenty-four hour program will offer him the maximum benefit.

School's Position:
Student should remain in his current placement in the public school. He has never presented behavioral problems in school. The problems he exhibits at home are not educational in nature. The school tried to provide parents with a trainer and advice concerning respite care. The program proposed by New Bedford is highly-structured, provides appropriate instruction in academics and daily living skills, and allows student

integration with non special needs students. Student has made great strides in the New Bedford program, which will continue to provide the maximum feasible education benefit in the least restrictive setting.

Findings: The IEP proposed by the public school was not reasonably calculated to provide the maximum feasible educational benefit to student, and the Perkins School for the Blind or a similar 502.6 program would be an overly restrictive placement. Academic progress, while not extensive, is evident. Student has made insufficient gains in daily living skills and safety awareness. Behavioral problems are not evident in school. Certain beneficial services have been consistently provided. Some recommended services have not been offered, and coordination of services is missing from his plan. Student's school performance indicates that his behavior is manageable and he is capable of developing functional life skills in the least restrictive setting in a substantially separate classroom.

BSEA # 90-1052

Issues: Whether student, identified as in need of a 502.4 substantially separate placement in kindergarten, which placement was unavailable for five months, is entitled to compensatory special education services.

Profile: Student is a six year old of borderline intelligence, who is attending his second year of kindergarten. Student is severely language delayed in his primary language, Spanish, and has behavioral, emotional, and cognitive difficulties. After an independent evaluation, the TEAM agreed on October 3, 1989, that student could benefit from placement in a 502.4 primary, bilingual class. An IEP offering this placement was presented to the parent at the end of December. No placement was available, however, because a teacher had not yet been hired. The teacher was ultimately hired at the end of February and the student began attending the program. All agreed services offered in the IEP and in the classroom are appropriate for the student. Parent argues that school should make up the time and services lost during the academic year over the course of the summer. School argues that no "significant" denial of educational services occurred.

Findings: Facts meet the standard for award of compensatory services set out in Stock: 1) entitlement to receive special education services; 2) significant denial of special education services; and, 3) lack of services attributable primarily to school system. Services should be delivered over the course of the summer.

BSEA # 90-1132

Issues: What proposed placement for student from 12/89 to 4/91 appropriately addresses his special education needs, so as to assure his maximum possible educational development in the least restrictive educational environment?

Parents' Position:
School's proposed placement is inappropriate to address student's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment. Parent contends that student requires a 502.5 private day school placement in order to appropriately address his special education needs.

School's Position:
School's proposed placement is appropriate to address student's special education needs. School contends that student's 502.5 private school placement is inappropriate.

Ruling: School's proposed 502.3 placement is appropriate to address student's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment where school's proposed program provides a combination of 1) special education classes in reading/language and math; 2) regular education classes in science and social studies with a special education mainstream facilitator in these classes; 3) academic support special education classes for these mainstreamed classes; 4) speech-language therapy; 5) transitional counseling during student's readjustment to public school; 6) in-servicing of all regular education teachers to student's specific needs; 7) weekly meetings between student's special and regular education service providers; and 8) numerous modifications to student's program. Student functions at grade level in reading and language and several years below grade level in math. Learning disability in the area of output of information and knowledge and organizational skills. All public school special education teachers were highly qualified with advanced level degrees plus extensive experience.

BSEA # 90-1158

Issue: Is school's proposed Individual Education Plan (IEP), which proposes suspensions for student beyond 10 days during the 1989-90 school year, appropriate to address student's special education needs so as to assure his

maximum possible educational development in the least restrictive educational environment?

School's Position:
School's proposed IEP, including alternative placement if student is suspended beyond 10 days is appropriate to address student's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment; and that student's handicapping condition does not interfere with his ability to follow school rules.

Parents' Position:
Student's special education needs have been violated because he has already been suspended for more than 10 days; that school can give detentions only if official school transportation is provided; and that school's disciplinary policy is inappropriate.

Ruling: School's proposed 502.3 IEP is appropriate to address student's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment. It is undisputed that the IEP meets the student's academic needs. Evidence is unrebutted that student's handicapping condition does not interfere with his ability to follow school rules. Evidence is undisputed that alternative program, if student is suspended, is appropriate. Student's rights have not been violated. He has been accorded those due process rights to which he is entitled for temporary (up to 10 days) suspensions. Evidence demonstrated that student has been suspended for only 9 days. Only modification ordered, consistent with Honig v. Doe, 108 S.Ct. 592 (1988) is that IEP reflects that the alternative plan is limited to 10 additional cumulative days of suspension. Hearing Officer has no authority over school's internal detention, after school, or disciplinary policies. Parties were referred to appropriate forum over dispute regarding detention transportation policy.

BSEA # 90-1163

Issues: Whether the 1990-1991, 502.4 collaborative placement was reasonably calculated to provide the maximum feasible benefit in the least restrictive setting; or is the new Rett Syndrome Program at the League School, a 502.5 placement, the most appropriate educational placement for the student.

Profile: Student is a five year old with Rett Syndrome, who has attended pre-school special education classes since she was 3. She functions at a 6-10 month level overall.

She has significant behavioral difficulties which interfere with most learning and daily activities. Some of the behaviors are self-abusive. Her attention span is approximately 30 seconds for any activity.

Parents' Position:
Student requires the highly-specialized, intensive, 12 month program offered by the League School in order to prevent the regression typical of Rett Syndrome. She requires some services, such as music therapy and hydrotherapy, which are not offered by the collaborative.

School's Position:
Student has made consistent progress, and little regression, in the intensive behavioral/educational preschool program at the collaborative. The services required are not different solely because of the Rett's diagnosis.

Findings:

1. The collaborative placement offers the necessary appropriate services in the least restrictive setting.
2. The IEP lacks a comprehensive summer component, and is thus inadequate in that respect.
3. The IEP is to be modified to provide for 12 months of intensive special education programming for the student.

BSEA # 90-1181

Issues: Whether 502.2 prototype IEP was appropriate?
Whether a placement at Willow Hill was necessary?

Profile: A 13 year old bright student with age appropriate skills. He exhibits an attentional deficit and some emotional difficulties interfering with his production of work.

Parents' Position:
Student requires the small group special needs school in order to get sufficient nuturing, structure, and individualization, so that he can produce at a level commensurate with his abilities.

School's Position:
Student can produce with the proposed services; the special needs setting is too restrictive for the student.

Findings: 1. The 502.2 prototype program is appropriate, if there is higher priority given for building student's self esteem through successful experiences, and, therapy services are provided.
2. The private school placement is too restrictive.

BSEA # 90-1274

Issues: Whether the case is moot?

Profile: Student is an 18 year old student who received special education services prior to her June 1990 graduation. Her parents are divorced. The father has physical custody; both parents have joint legal custody.

Parents' Position:
Over the course of the student's special education, the school denied the mother many rights. The school failed to notify her of many TEAM meetings, failed to conduct evaluations in a timely manner, as she requested. The BSEA should make a finding on this, so as to set the record straight and to stop it in the future.

School's Position:
The school does not deny the procedural errors. However, this case is moot, for the student has graduated, no compensatory services are requested, and thus, there is no relationship between the parties which could be affected by a BSEA decision.

Findings: The case is moot, and thereby, dismissed. Such dismissal does not diminish the importance of procedures set out to protect the right of special needs students and their parents.

BSEA # 90-1408

Issues: Was student entitled to summer program?

Profile: Student is a fourth grader receiving special education services to address a learning disability in a ptototype 502.2 special education program, and was performing a year and a half to two years below grade level in reading and language arts, but at grade level in other areas.

Parents' Position:
Student's special needs were identified only because parent arranged for an independent evaluation. Summer tutoring was needed to reinforce progress made in

newly-instituted learning disabilities program.

School's Position:
Student was making reasonable progress and did not require summer programming.

Findings: Student was not entitled to summer program. There was no evidence that a break in services would adversely affect her educational progress during the school year.

BSEA # 90-1409

Issues: Was student entitled to summer program?

Profile: Student is an eleven year old, sixth grader with a significant learning disability in the areas of reading and language arts and a moderate disability in mathematics. He is performing four years below grade level and had not improved in skill levels in the last two years. Following an independent evaluation initiated by the parents, student's program was modified to incorporate Stevenson Language Skills Program.

Parents' Position:
Student required summer tutoring to reinforce his recently introduced program. Public School had failed to identify seriousness of student's educational deficits.

School's Position:
Student had been making reasonable progress and does not require summer programming.

Findings: Although school system took position that student was making reasonable progress, the evidence suggested that he had made little or no progress and may have in fact regressed over the prior two years, and that those deficits had gone unremediated, until the parents' independent evaluation suggested use of the Stevenson Language Skills Program. In view of the educational risks to the student, if he does not begin to make educational gains, summer tutoring was required to increase likelihood that he can begin to make educational progress.

BSEA # 90-1678

Facts: Thirteen year old, multiply handicapped student presenting with a low incidence disability (Rett Syndrome) and exhibiting characteristic symptoms

thereof including: loss of functional hand skills, loss of ambulation, absence of functional language, severe to profound retardation, small head size and scoliosis of the spine. Student is dependent for all activities of daily living. She remains however cognitively alert, responds to music, communicates a basic yes/no response and utilizes eye gaze to make choices.

Student has spent entire academic career within 502.4 prototype substantially separate, ungraded programs within the CASE Collaborative. The LEA proposes continued placement within the Collaborative while parent seeks private placement in the newly established Rett Syndrome program at the League School.

Issues:
1. Whether the IEP proposed by the public school would serve to maximize student's educational development in the least restrictive environment consistent with that goal?
2. If not, whether the 502.5 prototype, the League School placement, would meet said standard.

Conclusion:

The proffered IEP, as modified by the terms of the decision, is responsive in virtually all respects to credible expert recommendations as to required educational service delivery for the student, and is reasonably calculated to maximize her educational potential in the least restrictive environment consistent with that goal. The League School program, while substantially similar to the Collaborative, does not meet the dual criteria of such standard, as it represents a more restrictive program than that proffered by the LEA.

BSEA # 90-1703

Issues: What proposed placement for student for 1990-91 school year appropriately addresses his special education needs so as to assure his maximum possible educational development in the least restrictive educational environment?

Parents' Position:

School's proposed 502.3 placement is inappropriate to address student's special education needs the student requires a 502.5 private day school placement in order to assure his maximum possible educational development in the least restrictive educational environment.

School's Position:

School's proposed 502.3 placement is appropriate to

address student's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment. The proposed 502.5 private school placement is inappropriate.

Ruling: School's proposed 502.3 placement is appropriate to address student's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment, given the following factors: 1) Despite learning disabilities, student tested at or above grade level in reading, at or slightly below grade level in language and math and 5 years below grade level in spelling; 2) IEP provided student with daily 1:1 remedial instruction tutorial, daily small group academic support class, modifications within regular education classes, and coordination between special and regular education; and 3) IEP addressed virtually all of parents' private evaluators' recommendations.

BSEA # 90-1828

Issues: Whether the 502.4 IEP proposed by LEA was appropriate or whether student required placement in a 502.5 program to address multiple special educational needs?

Profile: Student is seven years old with cognitive and language delays, behavioral and attentional difficulties, and a seizure disorder. Student attended substantially separate preschool programs, where he continued to fall farther behind peers in academic and language skills, although he made progress according to his own baseline. His attention, concentration, and behavior skills improved and the school proposed placement in an elementary school-based learning disabilities class.

Parents' Position:
Student's educational needs are far more extensive than those identified by the school. School personnel are not trained and cannot handle student's degree and type of seizure activity and its effect on his classroom performance. The focus of the proposed class is academic remediation and instruction and geared to students functioning at a higher level. Student needs the psychoeducational focus offered at the Community Therapeutic Day School.

School's Position:
Student is making progress according to potential. Evaluations show that student's seizures have no major effect on school performance. The proposed placement has the intensive behavioral and pre-academic training

in a structured small group setting that student needs. The Community Therapeutic Day School has reduced educational service and an inappropriate peer group.

Findings:
1. The proposed IEP does not address all of student's special education needs.
2. The placement at Community Therapeutic Day School, while overly restrictive, offered a more comprehensive approach to student's needs at a time when the school did not have an appropriate program.
3. The proposed 502.4 IEP can be modified to be the least restrictive most beneficial program for student. The parents are entitled to reimbursement of expenses associated with placement at CTDS until modifications are in place.

BSEA # 91-0059

Issues: Whether student's primary language is ASL or PSE?
Whether mainstreaming is appropriate?

Profile: Sixteen year old student of average intelligence with profound hearing loss.

Parents' Position:
Student should receive all education in an ASL environment taught by teachers of the deaf. To the extent that his ASL skills are limited, it is due to the lack of training in this language.

School's Position:
Student's primary language is PSE; if however, ASL is the appropriate method of communication, the school can provide it.

Findings: Student's primary language is ASL; the public school is not able to provide the ASL environment to the student.

BSEA # 91-0069

Issues:
1. What proposed placement for student for 1990-91 school year appropriately addresses his special education needs so as to assure his maximum possible educational development in the least restrictive educational environment?
2. Is the LEA responsible for cost of parents' recent independent evaluation of student?

Parents' Position:
LEA's proposed placement is inappropriate to address student's special needs. Student continues to require a 502.5 private day school placement in order to appropriately address his special education needs so as to assure his maximum possible educational development in the least restrictive educational environment. LEA is responsible for cost of the independent evaluation.

School's Position:
LEA's proposed placement is appropriate to address student's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment. Student no longer requires restrictiveness of 502.5 private day school placement. LEA is not responsible for independent evaluation of student obtained by parents.

Ruling: LEA's proposed 502.2 placement is appropriate to address student's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment with several amplifications/clarifications related to student's transition to public school setting where 1) student is of average intelligence and functions at approximately grade level in academic classes; 2) has been in 502.5 placement for last 4 1/2 years and has been functioning in highest academic grouping in private school for last several years; 3) has made significant academic, social, attentional, behavioral and emotional progress over last 4 1/2 years. LEA is not responsible for independent evaluation where parents expressed no dissatisfaction with last TEAM evaluation for 2 1/4 years, and until LEA initiated the appeals process.

BSEA # 91-0305

Facts: Fourteen year old student of low average to average cognitive ability, who presents with severe language and learning disabilities and attentional difficulties. As a result of her constellation of special needs, student's academic performance is 4-5 years below grade level in core subjects. Student is socially well-adjusted.

Educational history included placement in substantially separate program for (a) learning disabled students, (b) students with social (behavioral) learning difficulties, (c) students with needs in the functional/pre-vocational life skills/remedial areas.

The 502.4 prototype IEP under appeal calls for student's placement in a "support to mainstream" model

program for learning disabled students, including: services within the small group special education classroom, and mainstreaming with support, for given subjects. Parent seeks placement in a 502.6 prototype (residential) program for learning disabled students at the Landmark School.

Issues: Is the IEP proposed reasonably calculated to assure student's maximum feasible educational benefit in the least restrictive environment consistent with that goal? If not, would a residential placement at the Landmark School meet said standard?

Decision: The program proffered by the LEA does not serve to maximize student's educational development. Her record of performance under the auspices of past similar programs reveals a very slow rate of progress in a student of at least low average (to average) cognitive ability. Moreover, the proffered program would not provide her the intensive, self-contained, fully integrated language-based program which experts recommended. Given student's age, the severity of her skill deficits and her educational history, the program proposed is insufficient to address her needs. Furthermore, in light of her good social skills, those benefits which she might derive from a mainstream experience are not on balance, as critical as they might be in another scenario.

The record is unpersuasive as to student's need for a residential program. However, the day component of the Landmark School is endorsed, given that it would furnish student the self-contained, intensive, full day, special educational learning environment recommended by experts.

LEA is ordered to secure student's placement at Landmark on a 502.5 prototype basis and assume financial responsibility for tuition and transportation costs attendant thereto.

BSEA # 91-0345

Issues: Whether a 502.4 prototype placement provides for student's language disability needs, if not, whether a 502.5 prototype program so provides.

Profile: A 10 year old student with language disabilities of at least average intelligence is functioning 1/2 year below grade level in reading and spelling, and at grade level in math.

Parents' Position:
The LEA does not provide for the high degree of structure in curriculum and teaching methods to address the language disabilities and organizational difficulties.

School's Position:
The LEA provides the level of structure and organizational teaching necessary for student and provides some mainstreaming.

Findings: The LEA maximized student's educational needs in the least restrictive setting.

BSEA # 91-0387

Issues: Was a student who had been placed in a private day special education program prior to moving to the Massachusetts school district entitled to be placed in a comparable private day special education program in Massachusetts under the provisions of Par. 332 of the Chapter 766 Regulations, pending evaluation and provision and acceptance of a new IEP?

Profile: Student was an 8 year old child with learning disabilities. Prior to moving with his mother to Massachusetts, he attended the LAB School in Washington, D. C. The LAB is a private special education school, specializing in teaching learning disabled children. His placement was provided and paid for by the Washington, D. C. school system.

Parents' Position:
Under Par. 332 of the Chapter 766 Regulations, the student was entitled to be placed in the Carroll School, a private special education day school, because it provides a comparable special education program for learning disabled students.

School's Position:
There was insufficient evidence to demonstrate that the student had been publically-funded by Washington, D. C. in the LAB school. Par. 332 did not apply, because the student moved into the district from out-of-state. The school district did not consider the documents presented to it by the parent to constitute an IEP, and finally, the resource room program it offered was "comparable" within the meaning of Par. 332.0.

Findings: Par. 332.0 applies to out-of-state special needs students who move into a Massachusetts town. Under its provisions the comparable program to that attended by the student, prior to moving to Massachusetts, is a

private day school program in a special education school, providing services to learning disabled students, in this case the Carroll School. Therefore, the public school district was obligated to place the student in the Carroll School upon his moving into its district, pending evaluation and acceptance of a new IEP.

BSEA # 91-0394

Issue: Appropriate service provider for family therapy.

Profile: Student is a six year old student of average intelligence with severe emotional/behavioral problems. She has required several hospitalizations.

Parents' Position:
Student should remain with her outside therapist in order to obtain the long-term, trusting relationship needed to obtain progress.

School's Position:
The residential school provides a therapist, this is sufficient.

Findings: Student requires a long term trusting therapist. The residential school has not, to date, provided it. Until the residential school can provide this, the LEA must provide for the outside therapist's services.

BSEA # 91-0462

Issues: Whether student's school record should be released to parents?

Profile: Thirteen year old student of average intelligence and learning disabilities.

Parents' Position:
They have a right to the record.

School's Position:
They have already provided all documents.

Findings on Motion:
The record must be provided, including any newly discovered documents.

BSEA # 91-0550

Issues: Was the substantially separate program offered by the public school district able to provide for the student's maximum feasible educational development, or did the student's unique educational needs necessitate his placement in a special education day program?

Profile: Student was eleven years old and of average intellectual ability. He historically had difficulty in acquiring basic academic skills in a regular education setting. The student had never attended the public school programs, but rather had been placed in a small regular education private school prior to the parent's request for a special education program. The student displayed attentional and auditory weaknesses, and required one-to-one teaching with few auditory or visual distractions to learn.

Parents' Position:
The public school program was similar to the regular private school program the student had been attending, where his distractibility and attentional issues prevented him from making educational progress. The Carroll School provided the type of focused, small-group learning environment which he needed.

School's Position:
The student was mildly learning disabled, with many age-appropriate strengths and adaptive skills. The IEP offered placement in a self-contained classroom with similarly-able peers and appropriate teaching techniques and tools. He did not need placement in a more restrictive setting.

Findings: Evaluations of the student's learning needs and performance have consistently shown that he required one-to-one teaching with few auditory or visual distractions in order to learn new information. He also required one-to-one reinforcement in order to produce written work, organize his materials and to acquire new skills. Even with extensive classroom modifications made by his prior year's teacher, the student did not make appropriate progress, due to the "open classroonm" setting. The public school program, although in a self contained setting, could not provide the distraction-free setting required by the student in order to maximize his educational progress. Thus, although the student's level of disability was not severe, his unique educational needs required placement in a private school in this case. The special education program which could be provided in the Carroll School was better suited to the student's educational needs than that offered by the public school.

BSEA # 91-0598

Issues: Whether gifted student is in need of special education?

Profile: An 8 year old student with cognitive skills in the superior range is in the third grade, where he performs at or above grade level.

Parents' Position:
Student should be with students similar to himself with an individualized program at his level.

School's Position:
Student is making effective progress and has no attributes or handicaps which would deter such progress.

Findings: Student has no attributes or handicaps which deter him from making effective progress and therefore is not a special needs student under M.G.L. c. 71B, s. 1.

BSEA # 91-0652

Issues: Whether the school district's offer of a 502.4(i) placement was appropriate to meet student's identified educational needs in the least restrictive setting?

Profile: Fifteen year old student with a history of global learning weaknesses received instruction in a 502.4 setting after transferring from parochial school in the 6th grade. When behavior and truancy became an additional difficulty, a placement in a 502.4(i), substantially separate school placement was recommended. The student refused to attend the school, feeling that it was inappropriate for him to be a racial minority. After six months out of school, student agreed to attend a private school for learning disabled students.

Parents' Position:
A school is not appropriate if the student refuses to attend. The public school is responsible for funding the placement where the student will actually attend and benefit.

School's Position:
The 502.4(i) program offers the student all the services identified by evaluators as appropriate for the student: academic remediation, tutoring, small, structured classes, behavior management, family, group and individual counseling, substance-abuse counseling. It is the least restrictive, appropriate educational placement for him.

Findings:
1. The McKinley, 502.4(i) program is the least restrictive, appropriate educational placement about which there was evidence at the hearing.
2. Student's refusal to attend the proposed placement was not related to any special educational need, but rather to racial prejudice, which does not require accommodation under federal or state law.

BSEA # 91-0659

Issues:
1. Need for a consistent, structured on-site program comprising academics and vocational areas.
2. Need for a full-time on-site counselor who is fluent in American Sign Language.
3. Need for a sizeable peer group with profoundly deaf students.

Profile: Student is a profoundly deaf, 17 year old student, whose cognitive abilities are at least solidly average. Both his 2nd to 3rd grade reading level, and his 5th grade math level, remained virtually unchanged during his past three years at the Horace Mann School. Excessive absences, tardiness, and behavioral problems mounted during the 1988-1989 school years. Student is motivated to graduate from high school, and enter an automotive-related vocation.

Parents' Position:
Parent rejected Boston's 502.4 IEP, that provided for academic instruction at West Roxbury High School in the mornings, and vocational studies at ORC in the afternoon, for the following reasons: (a) Absence of a full-time counselor at West Roxbury, fluent in ASL, to deal with student's demonstrated behavior problems, and any emerging problems; (b) Split-day program fails to provide required structure and consistency both the parent's and Boston's experts agree is essential for his educational progress; and (c) Absence of a sizeable, compatible deaf peer group, and sufficient opportunities for social interaction within the deaf community, would likely result in continued lack of motivation for educational demands, and diminished self-esteem. Parent requested that student be placed in the EDCO program, sited at Newton North High School.

School's Position:
Boston's support of the proposed IEP rested on the following arguments: (a) Both academic programs at West Roxbury High School and EDCO are comparable, offering a mix of self-contained, special education, and mainstreamed classes - with appropriate teachers of the deaf, and interpreters; (b) Student's failure to

progress satisfactorily was due largely to his excessive absences, tardiness, and failure to invest himself in academic demands; (c) Boston offered to provide a full-time counselor at West Roxbury High School, competent in ASL, to deliver scheduled, and as-needed services to student, at least initially.

Findings: Considering that EDCO's faculty includes a full-time, and part-time counselor, both fluent in ASL; that the 1990-1991 population at EDCO's high school included 23 - 25 profoundly deaf students, like the student, while West Roxbury had 2 - 3 similarly deaf students, that academic and vocational instruction at EDCO is provided on-site at Newton North High School; and that EDCO provides a vast array of social opportunities, hearing officer found that the EDCO program was better calculated to promote student's maximum educational benefits in the least restrictive environment, consistent with federal and state special education laws.

BSEA # 91-0778

Issues: Was provision of services to monitor student's respiration and ventilator use an excludable medical service or a required related service under special education laws?

Profile: Student is a 20 year old student, who has been ventilator dependent since spinal surgery. He resides at New England Sinai Hospital and Rehabilitation Center, and receives individual tutoring provided by Hopedale Public Schools. He applied for the 502.7(b) program at Massachusetts Hospital School, that is supervised by the Department of Public Health, but was only accepted if he was accompanied by a full-time trained healthcare professional, or respitory therapist to monitor his ventilator, and intervene, if necessary, if the ventilator should malfunction. The Department of Education, through its Bureau of Institutional Schools provides the educational services at MHS.

Student's Position:
Student contended that both state and federal special education statutes and regulations can be extended to include a trained healthcare professional, or respiratory therapist, to monitor his ventilator, under the nursing services provision incorporated within related services. Since he clearly qualifies among the most severely handicapped category, he argued that the spirit of federal and state statutes that give first priority to this group of students, should entitle him to the provision of a healthcare professional in order to allow him to receive a free appropriate public

education with maximum educational benefits in the least restrictive prototype.

Parties' Position:
Although the state administrative and judicial record is silent on whether the provision of this intensive type of healthcare is an excludable medical service under Reg. 503.1(c) - nursing services, Hopedale, DPH, and DOE relied on federal court decisions that found that the federal regulations dealing with nursing services, under related services, did not require funding of a healthcare professional to monitor student's ventilator, as a required related service, because those services were beyond those normally provided by a school nurse to the normal population of children within a school building.

Findings: Based primarily on federal court decisions in Tatro, Detsel, and Bevin, the extent and nature of the service required by a trained healthcare professional, or respiratory therapist, although not required to be performed by a licensed physician, still exceeds the intent of nursing services contemplated by the State Legislature and Congress.



Issues:
1. Discipline of special needs student.
2. Authority to change special needs student's placement in case of dangerous or disruptive behavior.

Profile: Student is an 18 year old student, who has been in special education programs since 4th grade for learning and behavioral reasons. When he last attended school, student was placed in a substantially separate program at a comprehensive high school, however, the public school had proposed a change of placement to a separate school (prototype 502.4(i)) or a prototype 502.5 day program. Student had voluntarily absented himself from school for approximately two months prior to hearing.

Parents' Position:
Neither student nor parent accepted or rejected the special education program offered by the public school, and neither appeared at the hearing, which was requested by the public school. Student was reported by public school staff to want to attend high school in his own neighborhood, not the program offered by the public school.

School's Position:
The student persistently engaged in threatening

behavior, while in the substantially separate programs he attended at two of the system's comprehensive high schools, and requires a more restrictive program in the separate school. His special education needs require that he be placed in a more structured and controlled setting. Student wanted to be readmitted to school, but public school only wanted to offer the prototype 502.4(i) program, should the student choose to return.

Findings: The limited evidence presented at the hearing -- since neither the student nor his parent appeared -- suggested that the public school's position was a reasonable one in light of the student's behavioral and educational needs. However, under the provisions of 20 U.S.C. s.1415(e)(3) (the stay put provision), the school system could not unilaterally change the student's educational placement, and would have to seek a court injunction should the student seek to return to school in order to compel his attendance at the 502.4(i) program.

BSEA # 91-0869

Issues: Should visually impaired, developmentally delayed student's Orientation and Mobility Training (OMT) be provided after normal school hours or during the regular school day?

Parents' Position:
OMT is provided within student's home community and it is more realistic that OMT should be provided after normal school hours, since that is when student is normally within her home community. Further, student cannot appropriately receive all of her educational services under her Individual Education Plan (IEP) and receive her OMT as well, all within the normal school day.

School's Position:
Goals and objectives of IEP are being met under current IEP and student's schedule within the regular school day. There is no evidence to support provision of OMT on an extended school day basis.

Ruling: OMT may continue to be provided during the regular school day and need not be provided after school hours on an extended school day basis 1) where regulations specify a regular school day, unless otherwise specified, and where student's IEP provided for all special education services to be furnished within a regular school day, including OMT; 2) issue of OMT services being provided after normal school day was

considered by the TEAM and rejected; and 3) most significantly, where parents presented no evidence supporting an educational justification for OMT to be provided after the regular school day, nor that the student's receipt of OMT during the regular school day had adversely impacted upon any other areas of her special education program.

BSEA # 91-0895

Issues: Can a party receive a hearing on the merits on a matter which was decided by a prior hearing decision, covering the same period of time, if the party seeks to introduce issues and evidence which were not brought forward at the earlier hearing; or should the hearing request be dismissed?

Background:
Student is a learning disabled, seventh grader, currently attending the Carroll School at parental expense. A hearing decision (BSEA # 90-1132) covering the 1990-1991 school year issued by another BSEA hearing officer determined that the least restrictive appropriate special education program for the student was that being offered by the public school, not the Carroll School program requested by the parent. Parent wished to introduce evidence concerning the presence of lead in the public school's drinking water, which evidence was not introduced in the prior hearing.

Parents' Position:
The student's learning disability was the result of lead in the public school's drinking water, and therefore, it cannot provide an appropriate special education program, where a return to school would subject the student to further exposure to lead in the water. Although this issue was not raised in the prior hearing, the hearing officer should permit him now to raise this issue in a new hearing.

School's Position:
The parent had full opportunity to litigate his claim in the prior hearing, and therefore, he does not have the right to another hearing on the same school year.

Findings: The parent's hearing request must be dismissed under the doctrines of administrative res adjudicata and collateral estoppel. The issues the parent seeks to raise were either raised in the prior hearing, or to the extent that they involved the public school's capacity to implement the IEP ordered by the hearing officer, could be raised in a compliance hearing before

the hearing officer, who decided BSEA # 90-1132.

BSEA # 91-0905

Issue: Whether school's offer of an out-of-district placement was appropriate for student, whose last agreed upon placement was a 502.4, substantially separate class, and who committed a serious disciplinary violation?

Profile: Student is a 16 year old, who has been making progress commensurate with his potential in a 502.4 language-based classroom with substantial mainstream participation in regular high school classes and activities. Student was arrested at school and charged with carrying an illegal firearm and ammunition. Student was suspended immediately and parties agreed to a home tutoring program, pending an independent evaluation of student's educational needs. After the evaluations were completed, public school team drafted an IEP calling for a "502.4(i), 502.5 or 502.6" placement, and contacted at least 16 private or collaborative programs for student's placement. Student requested re-admission to the high school under the 502.4 IEP.

Parent's Position:
Student's educational needs have not changed. The 502.4 remains the least restrictive, appropriate educational placement for him. Student's mistake of bringing a weapon to school has been addressed by the court. School is not the appropriate punishing authority. School's 4 month exclusion of student was improper.

School's Position:
The weapon incident showed that school had failed to properly diagnose student as seriously emotionally disturbed. The high school does not have the resources to address such significant behavioral needs, thus a search for a more appropriate placement is necessary. Student's home tutoring program was not a disciplinary exclusion - it was an agreed upon educational program, pending re-evaluation.

Findings: 1. There was no substantial evidence that student is seriously emotionally disturbed. Rather the preponderance of evidence shows that student was making progress commensurate with his potential in 502.4 class. There was no support in record for change of placement. The weapon incident was appropriately addressed through court and regular high school disciplinary channels. No nexus was shown between the incident and special education

need, thus no change of placement is warranted.
2. The out-of-school program in place prior to the hearing was neither a disciplinary exclusion, nor a formal change of placement, but was a result of an agreement by parties' counsel and thus did not violate the student's educational rights.

BSEA # 91-1013

Issues:
1. Whether a proposed program is comparable to the IEP of prior residence?
2. Whether the proposed program maximized the child's potential in the least restrictive setting?

Profile: Student is of high average potential, and has emotional, social, as well as some graphomotor and organizational difficulties.

Parents' Position:
The proposed program is not comparable, and is not sufficiently supportive for the child.

School's Position:
The proposed program is comparable and is a supportive program which maximizes his potential.

Findings: The school's position was affirmed.

BSEA # 91-1089

Issues:
1. Whether 502.4 resource room is appropriate?
2. Whether 502.4 program in neighboring community is appropriate in the least restrictive setting?

Profile: Seven year old student of borderline cognitive skills has severe behavioral/social and language deficits.

Parents' Position:
Student requires a more intensive level of structure than can be provided in the resource room. The neighboring school provides the necessary level of structure.

School's Position:
The proposed program provides sufficient structure.

Findings: The school's program lacks the degree of structure necessary for student's social/behavioral and language needs. The neighboring school is the appropriate program in the least restrictive setting.

# EDUCATING CHILDREN WITH MEDICAL DISABILITIES: UNRESOLVED LEGAL ISSUES

Article by Kristen Reasoner Apgar, Esq.
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## Introduction

Advances in medical technology will increasingly make it possible for children, who are dependent on medical technology or who have chronic medical conditions, to participate in regular and special education outside of hospital or home settings. In addition, public schools are just beginning to face the impact of the increasing number of children suffering from AIDS or the effects of drug and alcohol addiction.

Students with chronic medical conditions can include children with a broad range of educational needs, from those whose cognitive abilities require no modifications of the regular school academic curriculum, but who may need school health or other related services in order to participate in regular school programs, to those who need extensive special education programming. The scope of responsibility of public schools under Massachusetts General Laws, Chapter 71B (Chapter 766), the Individuals with Disabilities Education Act (IDEA) or Section 504 of the Rehabilitation Act to provide appropriate education and the related services necessary to permit students' integration into public school settings is a matter of continuing legal controversy. Studies of public schools have concluded that because of the uncertain scope of school district obligation in this area there is "little consistency in the way in which students are served under the special education laws or under Section 504," Walker, "Care of Chronically Ill Children in Schools," Pediatric Clinics in America (Feb. 1984).

There are also major differences in the way that courts and administrative hearing officers throughout the country address the scope of required related services. At present there are no court decisions from the state or federal courts in Massachusetts addressing these issues. Recently, however, two Bureau of Special Education Appeals hearing officers decided cases involving students, who require full-time nursing services in order to safely attend their educational programs. See, Scott G. v. Hopedale, BSEA No. 91-0778, (page 42 of this volume), and Christopher K. v. Tewksbury, BSEA No. 89-1843, (page 12). Like courts and administrative hearing officers nationwide, the BSEA hearing officers reached conflicting legal conclusions as to the inclusion of full-time nursing services within the scope of related services under Chapter 766 and the IDEA, as well as under Section 504. Scott G. is currently on appeal to the Federal District Court for Massachusetts, and the Christopher K. decision has been appealed to Suffolk Superior Court, and a petition for removal to federal court was recently filed.

This article discusses current legal rulings regarding students' eligibility for related services under Chapter 766, the IDEA and Section 504 and addresses considerations of least restrictive setting.

## Eligibility for Services

The IDEA requires states and local school districts to provide a free appropriate public education to "all children residing in the State who have disabilities, [and]...who are in need of special education and related services," 20 U.S.C. s.1412. Disabilities are defined as "mental retardation, hearing impairments including deafness, speech and language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, or other health impairments, or specific learning disabilities," which result in a need for "special education and related services," 20 U.S.C. s.1401(a)(1). The federal regulations under the IDEA also require that the eligible student's disability "adversely affect [his/her] educational performance," 34 C.F.R. s.300.5(b)(1)-(11); i.e., there must be a nexus between the child's disability and a special educational need.*

Chapter 766 also requires a nexus between a special need child's "temporary or more permanent adjustment difficulties or attributes arising from intellectual, sensory, emotional, or physical factors, cerebral dysfunctions, perceptual factors or other specific learning disabilities or any combination thereof" and the inability to "progress effectively in a regular school program." In addition, the student must be in need of special education services. Special education is defined as "specially designed instruction at no cost to the parent(s) or guardian to meet the unique needs of a child in need of special education, including development of the chil's educational potential." 608 Code of Massachusetts Regulations (CMR) s.28.00, p. 129.0. This definition (of special education) incorporates that of the IDEA set forth at 20 U.S.C. s.1401(16).

For students whose cognitive functioning is adversely affected by their medical needs there would appear to be no question that they are covered by the IDEA and Chapter 766, since they would come within one or more of the federal disability categories and they would be unable to make educational progress without special education. However, where a child's cognitive potential is severely limited by medical conditions, as occurred

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*"Other health impaired" includes children with "limited strength, vitality or alertness due to chronic or acute health problems, such as heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes," which "adversely affects [their] educational performance." 34 C.F.R. s. 300.5(b)

in Timothy W. v. Rochester New Hampshire School District, 875 F. 2d 954 (1st Cir. 1989), the disabled student's capacity to benefit from access to public education may be uncertain or unmeasureable. Public schools have sometimes been reluctant to serve such students, especially as the services they require may consist almost exclusively of therapies or related services, arguably not special education. Nevertheless, the Timothy W. court emphasized Congress' intent that all special education children be served under the IDEA (then the Education for All Handicapped Children Act), regardless of the severity of their disability or the uncertainty of their capacity to "benefit" from special education, stating that educational services must be "broadly defined" to "include the most elemental of life skills", and that the essential core of the child's program could consist largely or almost exclusively of physical, occupational or speech therapy. 875 F.2d, at 970. See, Polk v. Central Susquehenna Intermediate Unit 16, 853 F.2d 171, 176, 183 (3rd Cir. 1988); Abrahamson v. Hershman, 701 F.2d 223, 228 (1st Cir. 1983); Kruelle v. New Castle County School District, 642 F.2d 687 (3rd Cir.1981).

Disabled Students Who Do Not Require Special Education: Eligibility for Services Under Section 504

Medically involved students, who do not require special education, but whose medical condition may require related services, such as supervision of routine medication or testing (e.g. blood sugar tests for a diabetic condition) by a nurse, specialized transportation, occupational or physical therapy, have consistently been excluded from the protections and procedures of the IDEA. See, e.g., Doe v. Belleview Public School District, 672 F.Supp. 1524 (M.D.Fla.1987) (Student with AIDS not covered by the IDEA, because he has no need for special education); A.A.v. Cooperman 218 N.J. Super. 32, 526 A.2d 1103 (1987) (student with orthopedic disability not entitled to transportation or to special education services). Nevertheless, such students are "qualified handicapped individuals" within the provisions of Section 504.

Unlike the IDEA, the Section 504 Regulations applicable to public school systems (in particular, 34 C.F.R. ss.104.31-.39) include the provision of related aids and services to handicapped children who need such services in order to participate in regular education. Students are eligible for the protections of Section 504, if they have "a physical or mental impairment, which limits one or more major life activity, a record of impairment, or are regarded as having an impairment." When children attend public school or are of school age, they are entitled to appropriate regular or special education and related services. Public schools are obligated to evaluate students to see if they are in need of special education or related services. Handicapped students may not be discriminated against in the provision of programs and services offered by the public school, and they are entitled to be served, as adequately in regular education as are non-handicapped students. If there is a dispute

over the provision of education, the public school must also provide for a due process hearing. 34 C.F.R. s.104.3 See, Rothschild v. Grottenthaler, 725 F.Supp. 776 (S.D.N.Y. 1989) (Section 504 guarantees meaningful access to benefits that the public school confers, ordering provision of sign language interpretor to deaf parents for school conferences involving their child).

The overall scope of the services that must be made available to handicapped regular education students with chronic medical conditions, however, while addressed in various Office for Civil Rights' rulings, has yet to be clearly developed in court decisions. See, e.g., Yorktown Central School District, 16 EHLR 108 (OCR 1989) (Student with asthma entitled to special transportation).

**Exclusion of Medical Services Under the IDEA**

Under the IDEA and Chapter 766, school districts are obligated to provide "such developmental, corrective, and other supportive services (including . . . medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education." 20 U.S.C. s.1401(17) (emphasis added).

The federal regulations further define related services to include "school health services," which are those "services provided by a qualified school nurse or other qualified person." 34 C.F.R. s.300.13(b)(4). See, Irving Independent School District v. Tatro, (Tatro) 468 U.S. 883, 104 S.Ct. 3371, 3377 (1984). It is the scope of related health care services which is at issue in cases involving provision of nursing or psychiatric services.

The controlling legal standard is that articulated in the Tatro decision. In that case the U.S. Supreme Court addressed the question of whether clean intermittent catherization (CIC) was an excluded medical service or a "school health service," which would be required to be provided to a disabled student, if she needed the service in order to attend her special education program. The court held that CIC is a school health service, articulating a three part test to be applied in reaching such a determination: 1) the student "must be handicapped so as to need special education;" 2) the services must be "only those services necessary to aid a handicapped child to benefit from special education;" and 3) "school nursing services must be provided only if they can be performed by a nurse or other qualified person, not if they must be performed by a physician." Tatro, 104 S.Ct. at 3378-9. For a similar analysis see, Department of Education of the State of Hawaii v. Katherine D. 727 F.2d, 809 (9th Cir. 1983).

Applying this standard, psychiatric hospitalization and other non-diagnostic hospital services have generally been excluded

from coverage under the IDEA. For example, in Clovis v. California Office of Administrative Hearings, 903 F.2d 635 (9th Cir. 1990), the Court of Appeals determined that placement of a student at an acute care facility for treatment of emotional and psychiatric needs was a medical placement, and the school district was not required by the IDEA to pay for hospital services. The court stated that the standard to be followed in determining whether the placement is an educational one, for which the school district is responsible under the IDEA, is whether the placement is necessary for educational purposes or is in response to medical, social, or emotional problems that would make it necessary apart from learning process. Clovis explicitly rejected the argument that if a student's educational, social, emotional, and medical needs are intertwined, the state or local school district may be required to fund a psychiatric placement. Accord, Darlene L. v. Illinois State Board of Education, 568 F.Supp. 1524 (N.D.Ill. 1983) (psychiatric services and hospitalization were excluded medical services). But compare, Vander Malle v. Ambach, 667 F.Supp. 1015 (S.D.N.Y. 1987) (State required to pay for services at a psychiatric hospital, because of the interrelated nature of student's emotional and educational needs).

The application of the Tatro standard to determine if extensive nursing services are required to be provided by education agencies as "school health services" has also resulted in sharply conflicting judicial decisions. The federal courts in Detsel v. Board of Education of Auburn, 637 F.Supp. 1022 (N.D.N.Y. 1986), aff'd 820 F.2d 587 (2d Cir. 1987), cert. denied, 108 S.Ct. 495 (1987), held that there must be reasonable limitations on the scope of nursing care as a related service under the IDEA, and that such a limitation cannot be based simply on whether the service provider must be a physician. Where a child's medical condition is such that s/he needs constant monitoring, e.g., checking vital signs, suctioning, administering medication, or being ready to administer cardio-pulminary resuscitation, in order to attend school, the provision of such services falls outside the range of school health services contemplated by the Tatro decision, even though the services may be performed by a nurse. Detsel, 637 F.Supp. at 1025-7. The BSEA hearing officer in the Scott G. case reflected the Detsel/Bevin analysis in construing the applicable state and federal provisions in that BSEA decision.

The district courts in Thomas v. Cincinnati Board of Education, 1988-89 EHLR Dec. 441:517 (S.D. Ohio 1989), reversed, 918 F.2d 628 (6th Cir. 1990), and Macomb County Intermediate School District v. Joshua S., 715 F.Supp. 824 (E.D. Mich. 1989), held the opposite view. They stated that under Tatro school districts must provide any specialized service, including monitored transportation, which can be performed by a nurse, if those related services are needed to permit a child to attend an appropriate public school program. Thomas and Macomb argue that the Detsel/Bevins' reasonableness standard has no basis in the IDEA and was contrary to Tatro. (It is this analysis which is reflected in the BSEA hearing officer's decision on Christopher K.

## ACCESSING THIRD PARTY RESOURCES TO PROVIDE FOR SCHOOL-BASED NURSING SERVICES

Following their unsuccessful effort to have the courts order the Auburn School District to pay for nursing services, the Detsels with the cooperation of Auburn sought to have Medicaid cover the cost of their daughter's school-based nursing services, just as it covered nursing services she required when at home. In Detsel v. Sullivan, 895 F.2d 58 (2d Cir. 1990), the Court of Appeals held that the U. S. Department of Health and Human Services through Medicaid was required to fund school-based private duty nursing services, because such services were medically necessary and provided in the least restrictive setting, which for a school-age child is at school.

Thus, Detsel v. Sullivan suggests an alternative to the expansion of the scope of related services covered by the IDEA, namely access to medical benefits delivered in the public school at third party expense. To the extent that the reluctance of school districts to provide extensive nursing services is primarily the result of cost, the decision provides an alternative means for assuring that students with extensive medical needs can be served in public school settings. However, the right to access third party payments for services, which are covered under medical insurance, but may also be considered related services under the IDEA, may also be considered related services under the IDEA, may often be limited to those instances where Medicaid, rather than private medical insurance is involved. (See, Chester County Intermediate Unit v. Pennsylvania Blue Shield, 16 EHLR 925 (3d Cir. Feb. 1990) (Private insurers not required to pay for medical benefits which are required under the IDEA).

## LEAST RESTRICTIVE ENVIRONMENT

As indicated from the above cases the setting in which medically-involved students are entitled to receive education is likely to be the subject of legal controversy. Where the student's medical needs are serious the school district may argue that homebound instruction is medically necessary. The district courts in Thomas and Macomb, relied heavily on the least restrictive environment requirement of the IDEA and followed the reasoning in Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983). A school system must demonstrate that the child's appropriate program cannot feasibly be provided in a less restrictive setting, before placing a child in an institutional or home setting. Although the courts looked to testimony of medical experts to assess the feasibility of transporting the students, the Thomas and Macomb district court decisions largely discounted school districts' concerns about cost or safety in favor of choosing the least restrictive setting. In contrast, the Appeals Court decision in Thomas discounted the pertinence of the least restrictive environment requirement to a severely disabled student. The court remarked that since it was undisputed that

the student was "unable to benefit from the social contact that a school setting provides . . . the mainstreaming concept is simply inapplicable." Thomas, 918 F.2d, at 52. Further, unlike the district court, the 6th Circuit was persuaded that professionals involved with the student had legitimate concerns about the safety of transporting her to and from the public school in an ambulance. Significantly, the 6th Circuit did not even address the applicability of Roncker to its analysis of the LRE obligations of the public school system.

Detsel also ignored the possibility that absent provision of school-based nursing services, the student in that case would be confined to home, even though she could be educated in mainstream classes. Although not apparent from the decision itself, this may be because the Auburn Public Schools agreed to fund the in-school nursing services during the course of the litigation.)

Other federal court decisions have taken a more restrictive view of the LRE requirements of the IDEA than Roncker. In Drew P. v. Clarke County School District, 676 F.Supp. 1559 (M.D.Ga. 1987) and Daniel R. R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989), the courts limited the financial obligation of school systems to create new programs in a student's neighborhood school and considered evidence of the student's capacity to participate in and benefit from the curriculum being offered to the typical students, as part of the circumstances under which a school must agree to extensive modifications necessary to permit a child to be educated in the mainstream. Under this more limited view of the LRE requirement of the IDEA, students with significant cognitive deficits like those in Macomb and Thomas may be found unable to benefit from education in the public school setting, and limitations may be placed on the districts obligation to provide special education in less restrictive settings.

## CONCLUSION

Review of the conflicting rulings addressing school district's legal and financial responsibility for providing services to students with medical needs provides no clear conclusions regarding the scope of legal obligation for public school districts in Massachusetts. Until Massachusetts state or federal courts rule definitively in this area, there will continue to be inconsistent legal views. Nevertheless, in Massachusetts and throughout the U. S., public school districts are striving to serve students with complex medical needs in public school settings through a variety of funding arrangements, including public school, Medicaid, private health insurance, and/or state agency resources. School districts seeking practical assistance in determining how to serve a medically fragile child may wish to seek technical assistance from the Regional Offices of Massachusetts Department of Public Health, and Project School Care at Boston Children's Hospital. See, Haynie, Porter, Palfrey, Children Assisted by Medical Technology in Educational Settings: Guidelines for Care, Boston Children's Hospital, 1989.

## SPECIAL EDUCATION APPEALS DECISION HISTORY

| SCHOOL YEAR | TOTAL NO. OF DECISIONS | DECISIONS FAVORING PARENTS | DECISIONS FAVORING SCHOOL | SUBSTANTIALLY MODIFIED PROGRAM, DIFFERENT PLACEMENT, ORDER FOR OR AGAINST MASS. DEPARTMENT OF EDUCATION |
|---|---|---|---|---|
| 7/84-6/85 | 85 | 33 (38.8%) | 31 (36.5%) | 21 (24.7%) |
| 7/85-6/86 | 85 | 40 (47.1%) | 24 (28.2%) | 21 (24.7%) |
| 7/86-6/87 | 55 | 28 (50.9%) | 18 (32.7%) | 9 (16.4%) |
| 7/87-6/88 | 54 | 27 (50.0%) | 22 (40.7%) | 5 (9.26%) |
| 7/88-6/89 | 48 | 20 (41.7%) | 18 (37.5%) | 10 (20.8%) |
| 7/89-6/90 | 47 | 26 (55.32%) | 16 (34.3%) | 5 (10.64%) |
| 7/90-6/91 | 44 | 15 (31.82%) | 22 (50.0%) | 7 (18.18%) |

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